the old business (*Churton* v. *Douglas*, Johns. 174, at 191), or to deal with his old customers (*Leggott* v. *Barrett*, 15 Ch. Div. 306). That the vendee's right cannot be protected to the full, is no reason in the eyes of the court for not extending protection as far as these authorities will allow.

The American decisions on this point are few, but emphatically opposed to the conclusion reached in *Trego* v. *Hunt*. The courts take the ground that it is the vendor, not the purchaser, who should have protection. The vendor has sold the advantage of an established business. It is only fair that he should be given every opportunity to compete on an equal footing with the purchaser. Goodwill, to be sure, is the probability of retaining the concern's customers; but it is a probability which the vendor may diminish by the exercise of certain unquestioned rights. What consistency is there in allowing the vendor to enter into the same kind of business, and to solicit trade publicly, and yet barring him from his most effective means of competing successfully, namely, the solicitation of his old customers? This is the attitude of the American courts. (*Williams* v. *Farrand*, 68 Mich. 473; *Cottrell* v. *Babcock &c. Mfg. Co.*, 54 Conn. 122; *Close* v. *Flesher*, 28 N. Y. Supp. 736.)

After all, is it not a question of original definition? Are not the courts, under the guise of deducing conclusions from accepted definitions, in reality defining anew the nature of goodwill? As goodwill is conceived of, on the one hand, as the chance of keeping the old customers subject to unlimited competition on the part of the vendor, or, on the other, as that chance free from such competition, so will the vendor be allowed or denied the right to solicit his old customers. And perhaps the English view of the scope of goodwill is the more just. Eighty years ago, Vice-Chancellor Plumer said: "A person, not a lawyer, would not imagine when the goodwill and trade of a retail shop was sold, the vendor might, the next day set up a shop within a few doors and draw off all the customers. The goodwill of such a shop in good faith and understanding must mean all the benefit of the trade, and not merely a benefit of which the vendor might deprive him the next day." (*Harrison* v. *Gardner*, 2 Mad. 198, at 219.) Yet mainly because of a strong aversion to the enforcement of any contract in restraint of trade that was not to be found in express words, the courts declined to adopt the lay conception of goodwill so vigorously approved by the Vice-Chancellor. Is not the decision in *Trego* v. *Hunt* commendable in that, as far as it is possible, it does adopt the view, then and now prevalent outside the courts, as to what constitutes fair business dealing? It certainly clothes that shadowy, intangible property, goodwill, stripped of wellnigh all its virtue by unfriendly decisions, with a little substance.

There is one seeming inconsistency in the law on this point as laid down to-day in the English courts. Solicitation of customers when the business is voluntarily sold is restrained; solicitation after the business is compulsorily sold in bankruptcy proceedings is not restrained. (*Walker* v. *Mottram*, 19 Ch. Div. 355.) On what principle can goodwill mean one thing when a man disposes of his business voluntarily, and another when his business is sold out by his assignees in bankruptcy?

MONEY PAID ON A BILL BEARING A FORGED INDORSEMENT. — Does the drawee who pays a bill with a forged indorsement upon it have to bear the loss? Is the familiar doctrine of *Price* v. *Neal* properly extended to

such cases? Is there no fundamental distinction between a forged indorsement and a forged drawing as affecting the rights between the drawee and the innocent indorsee to whom he has paid the bill? In *The London & River Plate Bank* v. *The Bank of Liverpool,* [1896] 1 Q. B. 7, Mathew, J. rests the two cases on the same grounds, and decides that the drawee who pays the innocent indorsee of a bill bearing a forged indorsement cannot recover back the money, on the principle that the payment by the drawee has caused the indorsee to lose his rights against prior indorsers. Undoubtedly the defendant can no longer charge prior parties as indorsers, as the time for notice of dishonor has gone by, but his rights on the warranty, implied in the sale of any chattel, remain unimpaired (2 Ames, Cases on Bills and Notes, 242, n. 1), and it is doubtful if it is of itself any defence to one who has received money under a mistake of fact, there having been a total failure of consideration, that his rights against other parties have been changed or his relations in respect to them altered. *Bobbitt* v. *Pinkett,* L. R. 1 Ex. Div. 368; *Canal Bank* v. *Bank of Albany,* 1 Hill, 291; *Rheel* v. *Hicks,* 25 N. Y. 289; *Koonzt* v. *Central National Bank,* 51 Mo. 275. It is said further, that "no single case has been produced in which, where payment has been made on a forged indorsement to the holder of it in good faith, the money has been recovered back." It is rather unfortunate that in so important a case the attention of the court was not called to *Bobbett* v. *Pinkett, supra,* a decision which is very difficult to reconcile with the principal case. The American cases in which such recovery has been allowed are collected in 1 Ames, Cases on Bills and Notes, 433, n. 2.

In *Price* v. *Neal,* 3 Burr. 1354, it will be remembered that it was the drawer's name that was forged, and it was held that the drawee, having paid an innocent indorsee, must himself bear the loss. But the distinction between such a case and one where an indorsement is forged is obviously that in the latter case the indorsee has never obtained legal title to the instrument, and, however innocent he may be, he is immediately liable at law to the true owner for the conversion. This principle is expressly recognized in *Bobbett* v. *Pinkett, supra.* If, as in the principal case, the drawee has paid the true owner, it would seem that the drawee should be subrogated to his rights and be enabled to compel the indorsee to account for the money received to his use. The whole subject is elaborately discussed in 4 HARVARD LAW REVIEW, 297.

It is to be hoped that the solution of a question of so much importance will not be left to depend on the authority of a single justice of the divisional court, but that the case will be carried up to the higher courts.

THE "TRUST FUND" THEORY. — In the late case of *Adams & Westlake* v. *Deyette* (65 N. W. Rep. 471), the Supreme Court of South Dakota rests its decision on the ground "that the assets of a corporation are a trust fund for its creditors." On this theory a judgment confessed by a corporation for money due on an executed *ultra vires* contract, admitted to give a right of action for the sum recovered, was set aside as a preference of creditors. The "trust fund" doctrine seems to owe its origin to a decision by Judge Story in 1824, in the case of *Wood* v. *Dummer* (3 Mas. 308). Since that decision it has been alternately applied and rejected by courts and eulogized and condemned by text writers. Within the last two years Judge Thompson has characterized it as "the only doctrine worthy